found next to his car on a winding country road in Durant, Oklahoma.[182] The next night, Kelsey's body was found next to his still-running pickup truck.[183] He was shot in the face and head several times.[184]

About twelve years earlier, appellant and Ronnie were implicated in the shootings of Ed Large and Mary Smith. [185] A few years before the Large and Smith shootings, appellant's brother had been paralyzed during a shootout between the St. Clair and Large families.[186] Appellant and Ronnie shot Ed Large to avenge appellant's brother.[187] According to the Commonwealth, there was no motive for appellant and Ronnie shooting Mary Smith other than she was in the back of Large's truck and witnessed Ed Large's shooting.[188] Appellant testified that Smith had stabbed his aunt as part of the feud.[189] The Commonwealth also elicited testimony that Ronnie would have been a witness against appellant in the Large and Smith killings before Ronnie's death, similar to how Kelsey would have been a witness against appellant in Ronnie's death before Kelsey's death.[190]

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[182] VHR 46: 1/13/12; 11:22:33.
[183] VHR 46: 1/13/12; 11:25:37.
[184] VHR 46: 1/13/12; 11:26:00.
[185] VHR 46: 1/13/12; 11:38:30.
[186] VHR 46: 1/13/12; 11:39:00.
[187] VHR 46: 1/13/12; 11:40:00.
[188] VHR 46: 1/13/12; 11:29:25.
[189] VHR 50: 1/20/12; 13:54:00.
[190] VHR 46: 1/13/12; 11:30:01.

The Commonwealth argued that appellant was a dangerous man who murdered with accomplices, then murdered the accomplices.[191] Appellant was also the type of man that made Mary Smith watch Ed Large's shooting before shooting her.[192]

Extraneous information about prior convictions is prohibited by KRS 532.025.

KRS 532.025, the statute that provides presentencing guidelines for death penalty cases, permits evidence of a defendant's "record of any prior criminal convictions." Similarly, KRS 532.055, presentencing guidelines for non-death penalty felony cases, permits evidence of "prior convictions of the defendant." In addition, KRS 532.055 allows the Commonwealth to offer evidence of "[t]he nature of prior offenses for which he was convicted." Tellingly, KRS 532.025 does not permit evidence of "the nature of the prior offenses" in death penalty cases.

As discussed below, it was improper for the trial court to permit the introduction of detailed facts and circumstances of appellant's prior offenses for which he was convicted, and the introduction of the circumstances Tim Keeling's death.

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[191] VHR 50: 1/20/12; 15:33:20, 15:35:43, 15:37:04.
[192] VHR 50: 1/20/12; 15:30:00.

Extraneous information about prior convictions is prohibited by KRS 532.055.

Even if this court views KRS 532.055 as being applicable in death cases to permit the introduction of "any other aggravating factors as otherwise authorized by law...," the trial court still impermissibly allowed evidence that exceeded the "nature of prior offenses," including the circumstances surrounding the deaths of Large, Smith, Ronnie St. Clair, and Kelsey. Such an error resulted in manifest injustice.

In *Bullitt I*, this court held the trial court did not err in permitting the Commonwealth to introduce "the entirety of the Oklahoma prosecutors' informations that led to appellant's four (4) First-Degree Murder convictions and his Solicitation of Murder conviction." 140 S.W.3d at 561. The informations included: (1) the name of the defendant (and any co-defendant), (2) the date the offense was committed, (3) the offense charged, (4) the name of the victim, (5) the weapon used in each offense (a firearm), and, in the Murder informations, (6) the fact that the victim died. *Id.* at 561. This court reasoned in 2004 that, "[b]ecause the language of the informations contained no more than a 'general description' of appellant's prior convictions, the trial court overruled appellant's objection" raised at the 1998 trial. *Id.* at 562.

But this court has since established a bright line rule regarding what is permissible for the Commonwealth in showing the "nature of [the defendant's]

prior offenses" under KRS 532.055(2) (a). *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). In *Mullikan*, this court reversed for a new sentencing hearing because a police officer gave information he learned from police reports and other witnesses about the defendant's prior convictions, including details about the defendant having a disagreement with a woman then putting his hands around the woman's neck. *Id.* at 108. Besides the hearsay problem, this court expressed concern that the information exceeded the scope of the "nature of prior offenses." *Id.* at 108-09.

Based on these concerns, this court held in *Mullikan* that, "evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed." *Id.* at 109. By following this bright line rule, a jury is prevented from impermissibly retrying prior crimes through the admission of extensive prior-crime evidence at sentencing. *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky. 1996). Accordingly, letting a jury hear this highly prejudicial evidence is "so egregious as to [result] in manifest injustice…," e.g., a palpable error. *Webb v. Commonwealth*, 387 S.W.3d 319, 330 (Ky. 2012). Further, the "failure to correct the error 'would seriously affect the fairness, integrity, and public reputation of the judicial proceeding.'" *Id.*, citing *Mullikan*, 341 S.W.3d at 109 (citations and internal quotation marks omitted).

In this case, as detailed above, the Commonwealth presented highly detailed and prejudicial evidence of appellant's prior convictions.

The admission of unduly prejudicial evidence of the circumstances of the Large, Smith, Ronnie St. Clair, and Kelsey murders rendered the trial fundamentally unfair. Especially considering that the court refused to allow details of Reese's prior murder, such "loaded" evidence needlessly inflamed the jury's passion and prejudice against appellant and denied him a fair trial. A new resentencing is required where evidence of prior convictions is limited to the elements of the crimes previously committed. *Webb*, 387 S.W.3d 319.

Evidence of uncharged crimes and dismissed charges is prohibited by *Blane v. Commonwealth.*

In the guilt phase, Dennis Reese detailed appellant's role in Tim Keeling's kidnapping and murder.[193] The jury heard that Keeling was 21 and was a good Christian who helped the homeless. [194] Reese claimed appellant took Keeling out of the truck in New Mexico before crossing the Texas border (because Texas uses the death penalty), shot Keeling in the back and behind the left ear, likened killing people to killing dogs, was happy about the Keeling murder, and told Reese that Keeling's 18-month-old daughter was "one bitch that's gonna grow up without a daddy."[195]

The Commonwealth, in error, introduced evidence related to Keeling's kidnapping and shooting. This evidence was not admissible as a prior bad act.

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[193] VHR 43: 1/11/12; 11:47:00.
[194] VHR 43: 1/11/12; 11:49:50.
[195] VHR 43: 1/11/12; 11:50:33.

See 404(b) issue #6, *supra.* Appellant had not been convicted of any of these crimes. *Blane v. Commonwealth*, 364 S.W.3d 140, 152-53 (Ky. 2012) (palpable error to admit dismissed charges and original charges later amended).

In *Blane*, the defendant received the maximum penalty; the Commonwealth elicited testimony of the original charges, and emphasized the original charges in its closing. *Blane*, 364 S.W.3d at 152. The *Blane* court held it was palpable error because the defendant received a maximum sentence after a jury was told of the defendant's amended charges.

In reversing *Blane* for a new sentencing hearing, this court cited with approval the proposition "that the maximum sentence has been imposed by the verdict, and it would be pure speculation for us to ponder what, if any, portion of the punishment stemmed from the improper argument of counsel." *Blane*, 364 S.W.3d at 153 (quoting *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969) (reversing and granting defendant a new trial after the prosecutor made improper comments during closing arguments)).

What happened in the instant case is worse than what occurred in *Blane.* First, here the evidence came in during the guilt phase, and could have contributed to the guilty verdict. Also, appellant was never charged for Keeling's kidnapping and murder. Further, appellant was sentenced to death--the maximum sentence. It would be impossible to speculate whether the above

guilt phase testimony related to the uncharged crimes contributed to his death sentence.

In light of *Mullikan*, *Webb*, and *Blane*, the wholesale admission of evidence concerning the deaths of Large, Smith, Ronnie St. Clair, Kelsey, and Keeling, along with evidence of Keeling's kidnapping and murder violate Kentucky statutes and case law. Thus appellant's rights under the 5th and 14th Amendments of the U.S. Constitution and §§ 2 and 11 of the Ky. Constitution were violated. Appellant respectfully requests this court to reverse and remand his case to the Hardin Circuit Court for a retrial, or at a minimum, a new sentencing.

16. The court violated due process by denying directed verdict on the "prior capital conviction" aggravator.

Preservation. This issue is partially preserved by counsel's penalty stage motion for directed verdict and more completely preserved by appellant's pro se motion to exclude [retroactive application of] new law regarding the Oklahoma convictions due to double jeopardy and court ruling.[196] Though Justice Cooper raised the issue in dissent in *Hardin I,* the issue has never been raised by the parties, and has not been considered by this court.

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[196] VHR 50, 1/20/12, 10:34:57 et seq. and TR XVII, 2380; TR XXII, 3162; TR XXII, 3162-3165;VHR 7, 7/09/10, 2:10:58 – 2:18:03. See also Order, August 10, 2010, TR XXXIII, 4869-4870, stating the issue stands decided as law of the case.

In 1991 a prior record of "conviction" --as used to define the aggravating factor in KRS 532.025(2)(a)(1)-- meant a final *judgment* of conviction. *Thompson v. Commonwealth*, 862 S.W.2d 871, 877 (Ky. 1993) (*overruled by Bullitt I*). In *Bullitt I* this court held all that's required for a prior "conviction" is an accepted guilty plea or a guilty verdict rendered by a judge or jury, and applied the overruling of *Thompson* retroactively in order to uphold appellant's original Bullitt County death sentence. *Hardin I*, 174 S.W.3d at 483-84.

As he did in *Bullitt I*, Justice Cooper dissented in *Hardin I* because while he agreed *Thompson* should be overruled, he believed that directed verdict should have been granted on the "prior conviction" aggravator. Cooper opposed the retroactive application of the overruling of *Thompson* in the Hardin case on the same grounds supporting his dissent in *Bullitt I*, based on *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964) and *Dale v. Haeberlin,* 878 F.2d 930, 934 (6th Cir.1989) ("We hold that the constitutional due process protections, like *ex post facto* protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act."). In *Hardin I* Cooper referred back to his dissent in *Bullitt I,* 140 S.W.3d at 575, to incorporate additional federal cases cited there. *Hardin I*, 174 S.W.3d at 487.

The law of the case doctrine does not apply where controlling law changes in the interim, *Estep v. Commonwealth*, 64 S.W.3d 805, 812 (Ky. 2002), or to issues not previously raised that appear for the first time in a court's opinion. Moreover, this court is not bound by the mistakes of the past. Appellant urges the court to overrule *Bullitt I* and *Hardin I* insofar as those opinions apply the overruling of *Thompson* retroactively. Overruling *Bullitt I* and *Hardin I* is necessary to correct the violation of the rule of lenity and the "fair warning" principle of federal due process (argued below). A new sentencing trial is required in which the jury is not allowed to consider the death penalty, LWOP25, or LWOP.

17. Instructing the jury it could select death based on a finding the victim was not released alive violated law of the case in *Hardin I.*

Preservation. This issue is preserved by the defense proposed jury instructions which omitted victim-not-released-alive as an aggravator.[197]

In *Hardin I* appellant argued that capital punishment could not be imposed for kidnap based solely on the fact the victim was not released alive, and a jury finding of murder was mandated by the 8th Amendment. This court apparently agreed, because it held in *Hardin I* that "[i]f the evidence on retrial is substantially the same, the jury shall be instructed that capital punishment may

[197] Defendant's Proposed Instructions, TR XXXVI, 5326-5344, at Tab 12. Instruction No. 12, The Penalty Phase, at 5339.

not be imposed unless the jury finds that St. Clair **murdered** Frank Brady during the course of the kidnapping," *St. Clair v. Commonwealth*, 174 S.W.3d 474, 483 (Ky. 2005) *citing*, 1 Cooper, Kentucky Instructions to Juries (Criminal) § 12.06 (4th ed. Anderson 1999) (*Hardin I*) (emphasis added).

Oddly, prior to this appeal no one seems to have noticed this language in *Hardin I*, language that abrogates *Roark* by recognizing and reinstating murder as a required element of capital kidnap. Certainly the trial court entirely overlooked and ignored the *Hardin I* directive that on remand it must instruct the jury to find appellant murdered Brady. The evidence in the third trial was substantially the same as in the first trial. Yet the trial court failed to instruct requiring the finding during either the guilt or penalty phase, and no finding was made that appellant murdered Brady. Instead, the court instructed the jury that it could find appellant both guilty of capital kidnap and eligible for death on the same finding, that the kidnap victim was not released alive.[198]

This is the second time appellant has suffered retrial by a court that failed to obey remand directions. After the second capital sentencing trial in Bullitt County, this court remanded in *Bullitt II* for a third sentencing trial because the court failed to instruct the jury on remand as plainly directed in *Bullitt I*:

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[198] Court's Instructions, TR XXXVIII, 5600 and 5608, at Tab 2 and Penalty Jury Instructions, TR XXXVIII, 5609 and 5611 at Tab 2.

> This case must be reversed and sent back again for re-sentencing because the trial court failed to comply with this Court's clear directive to instruct the jury on the germane aggravating circumstance in conformance with the statutory language describing this aggravating circumstance. In *St. Clair I*, we reversed because the trial court failed to instruct the jury on the availability of life without parole (LWOP) as a sentencing option.

St. Clair v. Commonwealth, 319 S.W.3d 300, 304 (Ky. 2010) (*Bullitt II*).This hopelessly unwieldy case now requires at least a re-sentencing trial in Hardin County to enforce the holding of *Hardin I.*

On remand in spite of *Hardin I* the court persisted in interpreting KRS 509.040 to allow a second death sentence for kidnap on a bare finding that a victim was not released alive. This violates the 8th Amendment.[199] As argued below, it also violates the rule of lenity and "fair warning" aspects of federal due process. As argued further, the potential lack of unanimity regarding aggravation violates Section 7 of the Kentucky Constitution. *Wells v. Commonwealth,* 561 S.W.2d 85, 87 (Ky.1978); *see also Coomer v. Commonwealth,* 238 S.W.2d 161 (Ky.1951); *Cannon v. Commonwealth,* 291 Ky. 50, 163 S.W.2d 15 (1942). A new trial is required.[200]

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[199]As argued in *Hardin I* Brief for Appellant, this court's file, 2001–SC–0209–MR, Issue 23, Mental Health Issues, at Tab 13.

[200] In the event of a fourth Hardin County trial, double jeopardy principles bar the use of the murder of the victim as an aggravator. This objection is preserved. Appellant made an oral *pro se* objection that "the Kentucky Supreme Court in their last decision made murder an element of kidnap" VHR 6, 8/28/08, 2:29:37; Order denying, TR XXVI, 3791A-3791B; In 2006 counsel renewed and refilled his 1998 Motion to Exclude Death Penalty as a Potential Punishment, based on a double jeopardy argument. TR XVIII, 2588- 2592. Counsel argued

18. Instructing the jury that it could select death based on victim-not-released-alive violates the due process rule of lenity.

Preservation. This issue is unpreserved. Appellant argued in his first direct appeal that KRS 509.040 as interpreted in *St. Clair v. Roark*, 10 S.W.3d 482, 486-7 (Ky. 2000) (*Roark*) is unconstitutional because it allows death to be imposed when a kidnap victim's death results from reckless homicide or a completely unintended accident, citing *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987).[201] Appellant also argued that KRS 509.040 as interpreted in *Roark* fails to channel and limit the class of persons who are death-eligible, citing *Furman v. Georgia*, 408 U.S. 238 (1972) and *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).[202] While not discussing these arguments, the *Hardin I* court held (as pointed out above) that on remand, "[i]f the evidence on retrial is substantially the same, the jury shall be instructed that capital punishment may not be imposed unless the jury finds that St. Clair **murdered** Frank Brady during the course of the kidnapping." *Hardin I*, 174 S.W.3d at 483 (emphasis added). It is the law of this case that finding the victim was not released alive cannot alone support a death sentence. *Fischer v. Fischer*, 348 S.W.3d 582, 593 (Ky. 2011). A finding of **murder** was required. Therefore

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that using murder as an aggravator would violate double jeopardy. TR XXX, 4491-4494; VHR 31, 3/8/09, 12:24:35 - 12:34:33.

[201] *Id.*

[202] *Id.*

Aggravating factor #1 on Verdict Form A, which requires only that the victim was not released alive, is invalid.[203]

Kentucky law and federal due process require lenity. In *Hardin I* appellant did not argue the issue presented here, that the interpretation of KRS 509.040 in *Roark* violates the due process rule of lenity. The trial court ignored the abrogation of *Roark* in *Hardin I* and persisted in interpreting KRS 509.040 in accordance with *Roark*. But for over fifty years Kentucky's rule of lenity has forbidden construing a statute to produce extremely harsh or incongruous punishment or turn a single transaction into multiple offenses, as occurred here:

> Doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense; so in case of ambiguity the construction will be against turning a single transaction into multiple offenses.

Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961). Under KRS 500.030, "[a]ll provisions of [the Kentucky criminal] code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law." According to the Kentucky Crime Commission/LRC Commentary, the purpose of KRS 500.030, enacted in 1974, is "to repudiate the common law principle requiring a 'strict' construction of

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[203]Penalty Jury Instructions, Verdict Form A, TR XXXVIII, 5616, at Tab 2.

penal statutes." Under KRS 500.030, if a statute is ambiguous in and of itself, or it is ambiguous when read in conjunction with another statute, a criminal defendant is entitled to the more lenient construction. *Boulder v. Commonwealth,* 610 S.W.2d 615 (Ky.1980); *Stoker v. Commonwealth*, 828 S.W.2d 619, 627 (Ky.1992).

The fact that KRS 509.040 is ambiguous is undeniable because in *Cosby* and *Roark* this court inferred two opposite meanings, one authorizing a death penalty only if a kidnap victim's death is intentional or wanton, and the other authorizing a death penalty for a victim's merely reckless or unintended death. In *Cosby v. Commonwealth*, 776 S.W.2d 367, 372-373 (Ky. 1989), this court interpreted the clause "when the victim is not released alive" in KRS 509.040 to refer only to cases involving a death that occurs as a result of some intentional or wanton aspect of the kidnapping. This was not an unreasonable interpretation.

But then in *Roark*, this court made an about face. By isolating and strictly construing the clause "when the victim is not released alive" the court reinterpreted KRS 509.040 to include any and all cases where a kidnap victim dies, even of natural, wholly unintended causes. *Roark*, 10 S.W.3d at 486-87.[204]

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[204] This violated KRS 500.030, which provides: "All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law."

The only possible explanation for inferring two different meanings in *Cosby* and *Roark* is that KRS 509.040 is ambiguous. When legislative intent is uncertain, no defendant should be subjected to punishment that is not "clearly prescribed":

> The rule of lenity requires that ambiguous criminal laws must be interpreted in favor of the defendants subjected to them. [citations omitted] "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008). Because the *Cosby* and *Hardin I* interpretation of KRS 509.040 that a death sentence cannot be based on an accidental death of a kidnap victim is reasonable and more defendant-friendly than the *Roark* interpretation, the rule of lenity dictates that the *Cosby*, etc. interpretation of KRE 509.040 must be considered the law. See also *Salinas v. Commonwealth*, 84 S.W.3d 913, 919-20 (Ky. 2002) (Opinion by Justice Cooper). *Lawton v. Commonwealth*, 354 S.W.3d 565, 573 (Ky. 2011); *White v. Commonwealth*, 178 S.W.3d 470, 483-484 (Ky. 2005).

Interpreting KRS 509.040 to allow double death sentences based on a single murder violates the federal rule of lenity contained within the concept of due process under the 5th Amendment as applied to the states by the 14th

Amendment. *Santos, supra; United States v. Lanier*, 520 U.S. 259, 265-266 (1997); *see also See Gall v. Parker,* 231 F.3d 265, 305 (6th Cir.2000) ("If the new interpretation was ... unforeseeable, if it was applied to events occurring before its enactment, and if the interpretation disadvantages the offender affected by it, then ... due process is violated just as the *ex post facto* clause would be."); *Young v. Commonwealth,* 50 S.W.3d 148, 162 n. 23 (Ky. 2001). Appellant had already been sentenced to death in Bullitt County for murdering Frank Brady when this case went to trial in 2012. In Hardin County a new non-capital trial on the kidnap charge is required in which the most severe penalty is 20 to 50 years or life for kidnap.

19. Instructing the jury they could recommend death based on finding the victim was not released alive violated the "fair warning" aspect of due process.

Preservation. This issue is preserved by *pro se* motion and court ruling.[205] The "fair warning" argument has not been raised previously and is not the law of the case. Reese testified that appellant's decision to kill Keeling in New Mexico was influenced by his awareness of the Texas death penalty, that after Keeling was killed when appellant saw a sign saying "7 miles to Texas," he said, "[t]hat's why I did that back there; they got the death penalty in Texas, and

[205] Pro se Motion to Supplement, etc., filed on May 13, 2010, TR XXXII, 4716-4721, at p. 4718 stating the "fair warning" argument; Order on Motion to Supplement, etc., 8/10/10, TR XXXIII, 4869 – 4871.

they use it."[206] In 1991 appellant was on notice Texas vigorously enforced its death penalty. But in 1991 while potential kidnappers in Kentucky were on notice under *Cosby* that they could receive the death penalty for kidnapping and murdering a victim, no one was on notice he could receive double death sentences for a single murder if it occurred in the context of a kidnapping. No one could have anticipated that interpretation prior to *Roark*.

Reversing *Cosby* and retroactively applying a re-interpretation of KRS 509.040 that eliminated murder as an element of capital kidnap in appellant's case violated the "fair warning" requirement of due process. *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964). *Bouie* is based on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." *Rogers v. Tennessee,* 532 U.S. 451, 459 (2001); *United States v. Barton,* 455 F.3d 649, 654 (6th Cir.2006) ("[W]hen addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount."). *Bouie v. City of Columbia,* 378 U.S. 347, 353–54 (1964); see also *Rodgers v. Commonwealth*, 285 S.W.3d 740, 751 (Ky. 2009).

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[206] VHR 43, 1/11/12, 11:51:20 – 11:56:26.

Bouie applies to an unforeseeable judicial enlargement of a criminal statute. "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie*, 378 U.S. at 353-354, *quoting, Smith v. Cahoon*, 283 U.S. 553, 565 (1931); see also *Rogers*, 532 U.S. at 462 and *Barton*, 455 F.3d at 653. An ex post facto law includes one that aggravates a crime or makes it greater than it was when committed:

> An ex post facto law has been defined by this Court as one ... 'that aggravates a crime, or makes it greater than it was, when committed.' If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie v. City of Columbia, 378 U.S. at 353-54.

Under *Cosby* in 1991 a kidnap in which the victim died coincidentally of a heart attack or accident was punishable at most by 20 to 50 years or life in prison. The overruling of *Cosby* aggravated the crime of capital kidnap under KRS 509.040 and made it greater by increasing the possible penalty to include capital punishment when a kidnap victim died by any means. Applying the *Cosby* overruling retroactively to allow two death sentences against appellant violated *Bouie* and due process. *Tharp v. Commonwealth*, 40 S.W.3d 356, 362–63 (Ky. 2000) (" '[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial

decision has fairly disclosed to be within its scope.'") (*quoting United States v. Lanier,* 520 U.S. 259, 266 (1997)).

Failure to release the victim alive is purely a death "eligibility" factor. The United States Supreme Court "addresses two different aspects of the capital decision-making process, the eligibility decision and the selection decision." *Tuilaepa v. California,* 512 U.S. 967, 971 (1994). A state's capital punishment scheme must exhibit both "eligibility" and "selection" criteria for imposing death. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 878 (1983). Kentucky law recognizes and embraces the fact that both eligibility and selection factors must be present in order to impose a death sentence. In 2002 in *Salinas* three years after *Roark* this court clarified that while failure to release a kidnap victim alive makes a defendant *death-eligible* under KRS 509.040, in order to actually *select* and impose a death sentence for capital kidnap a jury must also be instructed to find, and must find the victim was murdered:

> However, [the fact that the victim was not released alive] is not an aggravating circumstance necessary to authorize imposition of capital punishment under KRS 532.025(2). ...the instruction did not require that finding, and the verdict did not include that finding. If the evidence is the *same* on retrial, the jury shall be instructed to the effect that capital punishment cannot be imposed absent a finding that Appellant murdered Nuckolls during the course of the kidnapping. *See generally* Cooper, 1 *Kentucky Instructions to Juries (Criminal)* §§ 12.07 and 12.10A.

Salinas, 84 S.W.3d at 919-20. The *Hardin I* opinion, by requiring a jury finding of murder and not allowing death to be imposed for kidnap on a mere showing the victim did not survive, is in accord with *Salinas.*

Murder is a death "selection" factor. After *Salinas* and *Hardin I* the fact the victim died is no longer enough to support death. The murder of the victim is also a necessary element, to be proved during the penalty stage. *Roark* is no longer good authority supporting a death sentence based on instructions – like the instructions here--that fail to require a finding the victim was murdered.[207] This court reversed and remanded in *Salinas* because of instructions precisely like the ones here, which allowed a death sentence based on the bare fact the victim was not released alive.[208] *Hardin I* is in accord with *Salinas.*

Under the "elements rule" from *Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000), as applied in *Ring v. Arizona,* 536 U.S. 584 (2000), if no death sentence for capital kidnap may be "selected" without proof of murder, then by definition murder is an element of capital kidnap. Regardless whether it is found during the guilt phase or the penalty phase, and regardless whether it is called an "aggravator" or an "aggravating circumstance," if certain aggravating

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[207] Court's Instructions, Instruction #9, Penalty Jury Instructions, Instruction #3 and Verdict Form A at TR XXXVIII, 5600, 5611, and 5616, respectively, at Tab 2.

[208] See Issue 21, addressing the "unanimity" issue created by allowing the jury to choose among three separate aggravating circumstances, at least one of which was invalid.

evidence must be present before death may be imposed, then it acts as a necessary element. *Salinas* and *Hardin I* silently abrogated *Roark*, reinstated murder as a necessary element of capital kidnap and eliminated the possibility of condemning a man to death based solely on the unintended death of a kidnap victim.[9]

Justice Cooper authored *Roark*. But based on his reasoning three years later in *Salinas* that murder is a necessary element of capital kidnap, and based on his dissents in *Bullitt I,* 140 S.W.3d at 574-575, and *Hardin I,* 174 S.W.3d at 487, disapproving the retroactive application of an overruled case, it appears that after *Roark* Cooper changed his mind completely. Under the cases cited by Cooper in his dissents, including *Bouie*, because *Cosby* was the law when appellant's offense was committed, imposing a second death sentence on appellant for capital kidnap/victim not released alive violates both the "fair warning" requirement of due process and the 8th Amendment.[209] *Roark* should be overruled. Arguably it has been overruled already, by both *Salinas* and *Hardin I.*

The "fair warning" due process argument has not been raised before. Because in this third trial the court failed to instruct the jury to find murder as a required element to sustain a death penalty, appellant's current Hardin County

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[209] As argued by appellant in *Hardin I.*

capital kidnap conviction and sentence violate the "fair warning" aspect of federal due process. The capital kidnap conviction and sentence must be reversed and remanded for simple non-capital proceedings in which the most severe penalty is 20 to 50 years or life.

20. Directed verdict should have been granted as to the robbery aggravator.

Preservation. This issue is preserved. Defense counsel requested that the jury be instructed that it could consider evidence from the guilt phase during the penalty phase.[210] The court refused this instruction and instructed the jury (in pertinent part) as follows:

> You have tried the defendant and have returned a verdict finding him guilty of the Kidnapping of Frank Brady. From the evidence placed before you in that phase of the trial, you are acquainted with the facts and circumstances of the crime itself. You have now received additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, after which you shall fix a sentence for the defendant.[211]

The defense moved for directed verdict at the conclusion of the penalty phase for failing to prove aggravators and argued the Commonwealth didn't put on evidence of robbery, and it was not sufficient to say refer

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[210] Defendant's Proposed Instructions, TR XXXVI, 5326-5344, at Tab 12. Instruction No. 11, The Penalty Phase, at 5338.

[211] Penalty Jury Instructions, TR XXXVIII, 5609. At Tab 2.

back to the trial.[212] Directed verdict was overruled.[213] Under KRS 532.025(2)(a)(1) robbery is a statutory aggravator of kidnap, authorizing capital punishment.[214] However, in the penalty phase there was insufficient evidence for the jury to conclude appellant robbed Frank Brady. Under the due process clause of the 5th and 14th Amendments, to convict the accused, the prosecution must prove every element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). Denial of directed verdict on robbery as an aggravator violated appellant's right to due process.

21. All three aggravating circumstances are invalid; at a minimum this death sentence lacks unanimity under the Kentucky Constitution.

Preservation. This issue is preserved by appellant's objection to instruction on the "prior conviction of a capital offense" aggravator,[215] and by appellant's proposed instructions **omitting** victim-not-released-alive and robbery as selection factors.[216] The instant jury found three aggravating circumstances, 1) the kidnap victim was not released alive; 2) the appellant had

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[212] VHR 50, 1/20/12, 10.54.15.
[213] VHR 50, 1/20/12, 2:52:58.
[214] Appellant raised the failure to charge any aggravators in the indictment in *Hardin I*. See Issue 17, Brief for Appellant, *Hardin I*, at Tab 13. He reaffirms that argument, and all previously-raised arguments from *Hardin I* not repeated here, which are preserved for federal review.
[215] Motion to Preclude Instruction on Aggravator ["kidnapping was committed by a person with a prior record of conviction for a capital offense"], XVIII, 2632, at Tab 14.
[216] Defendant's Proposed Instructions, TR XXXVI, 5329- 5349, at Tab 12 listed only one selection factor, appellant's prior Oklahoma murder convictions.

a prior record of conviction for murder, a capital offense; and 3) the kidnap was committed during the course of a robbery.[217] All three aggravating circumstances are invalid.

Kidnap victim not released alive is an invalid aggravator. *Salinas, supra,* squarely holds that capital punishment cannot be *selected* to be imposed on the basis that a kidnap victim was not released alive, and a finding that the victim was murdered during the course of the kidnapping is required. See also, *Hardin I, Ring v. Arizona,* 536 U.S. 584 (2002); *Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000). Instructing the jury that it could impose a death sentence based on the bare fact the kidnap victim was not released alive violates the 8th Amendment, the law of the case in *Hardin I,* and *Salinas.* Aggravating circumstance No. 3 in Instruction No. 3 and Aggravator No. 1 hand written by the jury foreman on Verdict Form A are unconstitutional and invalid.

Appellant's prior capital convictions are invalid aggravators. As argued above, the retroactive application of the overruling of *Thompson* violated the rule of lenity and the "fair warning" principle contained in due process, and appellant's prior jury verdicts in Oklahoma should have been considered non-final. Therefore aggravating circumstance No. 2 is invalid.

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[217] Verdict Form A, Penalty Jury Instructions, TR XXXVIII, 5616, at Tab 2.

Kidnap committed in the course of first-degree robbery. Under KRS 532.025(2)(a)(1) robbery is a statutory aggravator of kidnap, authorizing capital punishment.[218] As argued above, directed verdict should have been granted as to the robbery aggravator. The fact no evidence was introduced during the penalty phase to support that appellant robbed Brady invalidates first-degree robbery as an aggravator.[219] In addition, the 8th Amendment arguably bars the death penalty for robbery because it did not result, and was not intended to result, in the victim's death. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Regardless of the evidence, the death penalty cannot constitutionally be imposed for a robbery/kidnap. See also, *Salinas* and *Hardin I*, which require that the victim be murdered.

Non-unanimous jury selection of death penalty. As just argued, the death sentence against appellant is invalid because none of the aggravators are valid. But if even one of the three aggravators is invalid, the death sentence is unconstitutional under Section 7 of the Kentucky Constitution due to a lack of juror unanimity. In Penalty Jury Instruction #6 the jury was instructed that "if upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall instead fix his punishment at a sentence

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[218] Appellant raised the failure to charge any aggravators in the indictment in *Hardin I*. See Issue 17, Brief for Appellant, *Hardin I*, at Tab 13. He reaffirms that argument, and all previously-raised arguments, which are preserved for federal review.
[219] Penalty Jury Instructions, TR XXXVIII, Instruction #4, 5612, at Tab 2.

of imprisonment."[220] Under Instruction 6, in accord with *McKoy v. North Carolina,* 494 U.S. 433 (1990) and *Mills v. Maryland*, 486 U.S. 367 (1988) each individual juror was free to refuse selection of the death penalty regardless of how many valid aggravating circumstances were found beyond a reasonable doubt. Each juror was free to find and apply mitigation as he or she saw fit. See also *Wiggins v. Smith*, 539 U.S. 510, 513 (2003) (reversing due to the reasonable probability that at least one juror might have struck a different balance had the omitted mitigating evidence been presented); and *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) ("[i]t is the responsibility of each juror to decide whether the defendant will be executed . . . ."). One or more jurors may have individually believed that mitigating circumstances balanced out robbery entirely as a "selection" factor. One or more may have selected death based solely on one or more invalid selection factors.

By offering the jury three selection factors including **at least** one that was invalid,[221] the jury instructions denied appellant a unanimous jury death selection decision. *Purcell v. Commonwealth*, 149 S.W.3d 382, 393-94 (Ky. 2004) ("[w]hen a jury is presented with alternate theories of guilt and one or more of those theories are unsupported by the evidence, and the verdict does not reflect

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[220] Penalty Jury Instructions, TR XXXVIII, Instruction No. 6, p. 5614, at Tab 2.

[221] This issue assumes Instruction 6 adequately informed the jury they could individually refuse to select death regardless of finding aggravating circumstances. If it did **not** adequately inform them of this fact, it is invalid based on the argument, below, in Issue # 24, below.

under which theory guilt was found, the defendant has been denied his right to a unanimous verdict"); *Carver v. Commonwealth*, 328 S.W.3d 206 (Ky. App. 2010) (reversible error when instruction for third-degree criminal abuse included all three theories for committing the crime but there was no evidence in the record to support one of the theories; an issue regarding unanimous verdict not subject to harmless error).

Section 7 of the Kentucky Constitution guarantees a unanimous decision by 12 jurors. *Wells v. Commonwealth,* 561 S.W.2d 85, 87 (Ky.1978); *see also Coomer v. Commonwealth,* 238 S.W.2d 161 (Ky.1951); *Cannon v. Commonwealth,* 291 Ky. 50, 163 S.W.2d 15 (Ky. 1942). Even though the federal constitution's requirement of unanimity does not to apply to the states, *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972); see also *Zant v. Stephens*, 462 U.S. 862 (1983) (state death penalty can be upheld despite invalid aggravators as long as there is one valid statutory aggravator), the faulty instructions violated appellant's right to a unanimous death selection decision as guaranteed under the Kentucky Constitution.

If the court agrees all three selection factors were invalid, retrial is required in which capital punishment is not an option. If the court agrees even one death selection factor was invalid, a new penalty trial is required.

22. Failure to instruct on "innocence of the death penalty" violated the 8th and 14th Amendments.

Preservation. This issue is unpreserved. **Penalty Jury Instruction No. 5** gave the jury four punishment options, 1) 20 to 50 years, 2) life, 3) life without parole for 25 years, and 4) death, followed by the following proviso:

> But, you cannot fix his sentence at death, or at confinement in the penitentiary for life without the possibility of parole until he has served a minimum of 25 years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the Aggravating Circumstances listed in Instruction No. 3 is true in its entirety, in which event you must state in writing, signed by the foreperson, that you find the aggravating circumstances or circumstances to be true beyond a reasonable doubt.

Penalty Jury Instruction No. 6 told the jury:

> "...If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment."[222]

Verdict Form B offered the jury the four options listed in No. 5, above, including 20 – 50 years, life, life without parole for 25 years, and death. But only the last option, death, included the following language:

> We, the jury, having found beyond a reasonable doubt the existence of the aggravating circumstances noted on Form Verdict A, fix the defendant's punishment for the kidnapping of Frank Brady at
>
> _____.
>
> (if "death", write in your verdict.)

[222] Jury Penalty Instruction 6, TR XXXVIII, 5614 at Tab 2.

These instructions failed to inform the jury that it retained the option not to sentence appellant to death no matter what, as required by *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433(1990) (holding invalid capital sentencing schemes requiring juries to disregard mitigating factors). Instruction No. 6 failed to explain any difference between reasonable doubt about one or more of the aggravators and reasonable doubt upon the whole case. The jury could have concluded that believing one aggravator beyond a reasonable doubt equated to removing all reasonable doubt from the whole case. In *Gall v. Commonwealth*, 607 S.W.2d 97, 112 (Ky. 1980), this court approved instructions that made it clear that even though the jury believed an aggravating circumstance was true and that it outweighed mitigation, it still did not have to recommend the death penalty. Here there was no such instruction and the jury was not clearly informed that even if it concluded the aggravating circumstance existed, it could still have a reasonable doubt about "the whole case."

The law presumes a defendant innocent of aggravating circumstances and unless these are proved beyond a reasonable doubt, the appropriate sentence for kidnap is a punishment other than death. Failure to instruct the jury accordingly violated due process. *Taylor v. Kentucky*, 436 U.S. 478 (1978). Contrary dicta in *Smith v. Commonwealth*, 599 S.W.2d 900, 909 (Ky. 1980) stating that such an instruction would, "of necessity" prohibit the jury from

recommending death should be rejected. Because the instruction failed to properly channel the jury's decision, it also violated the 8th and 14th Amendments. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976); *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

23. Failure to define reasonable doubt violated due process.

Preservation. This issue is preserved by the tender of a proposed reasonable doubt instruction stating that:

> ...[t]he jury is instructed that reasonable doubt may arise only from the evidence presented and the burden is solely upon the Government to prove each and every essential element as to the aggravating circumstances listed in Jury Instruction No. __. If the jury has reasonable doubt as to the truth of the existence of any element of the aggravating circumstances, you shall not make any finding with respect to it. If the jury has a reasonable doubt whether Michael St. Clair should be sentenced to death, his punishment shall be fixed at a sentence of imprisonment."[223]

Argument. Reasonable doubt was not defined for appellant's jury. RCr 9.56 states that the instructions should not attempt to define the term "reasonable doubt." As explained in *Pevlor v. Commonwealth*, 638 S.W.2d 272, 276-277 (Ky. 1982), this rule was a response to *Taylor v. Kentucky*, 436 U.S. 478 (1978), which criticized Kentucky's instructions regarding reasonable doubt. *Taylor*, 436 U.S. at 486-490. RCr 9.56 was adopted to ensure this would never happen again. But a solution that refuses all definition of reasonable doubt

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[223] Defendant's Proposed Instructions, TR XXXVI, 5329- 5344, at Tab 12. Proposed Instruction 3, at 5329.

violates due process. This court should overrule *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980), and *Smith v. Commonwealth*, 599 S.W.2d 900, 911 (Ky. 1980).

Lakeside v. Oregon, 435 U.S. 333, 340 (1978), lists reasonable doubt as a concept "that must not be misunderstood" if a defendant is to receive due process. Key elements of valid reasonable doubt instruction have been approved, including the concept that a reasonable doubt is a doubt "based on reason," *Jackson v. Virginia*, 443 U.S.307, 317 (1979), that a reasonable doubt is a doubt "based on reason which arises from the evidence or lack of evidence," *Johnson v. Louisiana,* 406 U.S. 356, 360 (1972), and that reasonable doubt is a doubt that would cause a reasonable person to "hesitate to act" in matters of importance. *Holland v. United States*, 348 U.S. 121, 140 (1954).

Every federal circuit except the 7th allows for instruction on the meaning of reasonable doubt. *U.S. v. Wallace*, 461 F.3d 15, 28 (1st Cir. 2006); *U.S. v. Shamsideen*, 511 F.3d 340, 343–344 (2d Cir. 2008); *Blatt v. U. S.*, 60 F.2d 481 (3d Cir. 1932); see also *U. S. v. Polan*, 970 F.2d 1280, 1286 n.4 (3d Cir. 1992); *U. S. v. Walton*, 207 F.3d 694, 695 (4th Cir. 2000) ("The rule regarding reasonable doubt for the jury is well settled in this Circuit—a trial judge may define reasonable doubt only if the jury requests a definition; however, the trial judge is not required to provide a definition, even if the jury requests it."); *U. S. v. Williams*, 20 F.3d 125 (5th Cir. 1994) (While not requiring trial courts to define

reasonable doubt, they are urged to do so.); *U. S. v. Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993); *Friedman v. U. S.*, 381 F.2d 155, 160 (8th Cir. 1967); *Nanfito v. U. S.*, 20 F.2d 376, 378 (8th Cir. 1927); *U. S. v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992); *U. S. v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974); *Holland v. U. S.*, 209 F.2d 516, 523 (10th Cir. 2001); *U. S. v. Daniels*, 986 F.2d 451 (11th Cir. 1993) opinion readopted on rehearing, 5 F.3d 495 (11th Cir. 1993); *U.S. v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993). This court should prescribe rules of practice and procedure directing that jury instructions defining reasonable doubt are not prohibited. Ky. Const. § 116. Under *Whiteside v. Parke*, 705 F.2d 869 (6th Cir. 1983), the failure to define reasonable doubt violates the constitution when it deprives a defendant of due process in light of the totality of the circumstances. *Id.* at 871-872.

"[A]ctual innocence of the death penalty" may be shown by merely clear and convincing evidence. *Sawyer v. Whitley,* 505 U.S. 333, 347, (1992). And with the stakes so high, reasonable doubt should be defined in every capital sentencing trial. A death verdict from a jury that has not been instructed on reasonable doubt violates due process and requires reversal under the 5th, 6th, and 14th Amendments. *Sullivan v. Louisiana,* 508 U.S. 275 (1993). Failure to instruct on reasonable doubt was structural error under *Sullivan* regardless of prejudice.

24. Failure to explain mitigators, standard of proof, sympathy, and mercy violated the 8th Amendment and due process.

Preservation. This issue is partially preserved by the defense tender of a two-page instruction on mitigation, No. 13.[224] The jury could have believed from appellant's testimony that it was Reese's idea to escape and Reese's idea to break into the Stevens' residence in Oklahoma. At least one juror could have believed appellant prevented harm to Vernon Stevens and his mother and did not accompany Reese to Denver or New Mexico. At least one juror could have believed that appellant was not the shooter, that Reese shot and killed Frank Brady. Moreover, at least one juror –if properly instructed—might have been swayed to vote for a sentence less than death based on appellant's childhood in a dysfunctional family culture as appellant described in his penalty phase testimony.[225] Appellant told the jury he was "born in the gutter" and experienced violence all his life. He explained that Edward Large had "ambushed" his family.[226] Appellant told the jury he loved his uncle but Ronnie St. Clair had tried to have him killed because they were competing with each other dealing drugs.[227] He killed William Kelsey because Kelsey was known to

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[224] Defendant's Proposed Instructions, TR XXXVI, 5329- 5344, at Tab 12. See proposed Instruction 13, at 5340-41.
[225] VHR 50, 1/20/12, 1:28:45 et seq.
[226] VHR 50, 1/20/12, 1:28:45 – 1:30:21
[227] VHR 50, 1/20/12, 1:30:21 – 1:31:02

have killed 19 people and "Kelsey would have killed me."[228] He told the jury that he couldn't have children and got involved in drug-dealing to hustle money for artificial insemination, or surgery, so he could have a family.[229] At least one juror could have believed any or all of St. Clair's background as he described it, and could have sympathized enough to spare his life.

But apart from telling the jury they are to "consider" mitigating circumstances, nowhere do the instructions make clear what role such evidence plays in allowing each individual juror to veto a death penalty. This is a violation of federal due process. *Smith v. Commonwealth*, 845 S.W.2d 534, 538-539 (Ky. 1993). (holding that the language of KRS 532.025 clearly states the judge *shall* include instructions to the jury regarding mitigating circumstances).The U.S. Constitution requires that "there is no reasonable possibility that the jury misunderstands its role in the capital sentencing procedure or misunderstands the meaning and function of mitigating circumstances." *Peek v. Kemp*, 784 F.2d 1479, 1493-1494 (11th Cir. 1986); see also *McKoy and Mills, supra.* In the case at bar, the jury was never told that "mitigating" circumstances mean "that the law recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment." *Id.* at 1494.

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[228] VHR 50, 1/20/12, 1:31:02 and 1:32:17 et seq.
[229] VHR 50, 1/18/12, 1:30:21

The jury must be told that it can reject death purely out of sympathy for the defendant. "The jury is permitted to consider mitigating evidence relating to the defendant's character and background precisely because that evidence may arouse 'sympathy' or 'compassion' for the defendant." *People v. Lanphear*, 680 P.2d 1081, 1083 (Cal. 1984). "This constitutionally mandated freedom to respond to sympathy aroused by mitigating evidence . . ." was not permitted by the court's instructions. *Id.* at 1084.

Further, the instructions failed to specify the standard of proof regarding mitigation. The court should have instructed the jurors to find mitigation (including but not limited to the possibility that Dennis Reese and not appellant was the dominant player instigating and carrying out the kidnap) if it was supported by "any evidence" or a "preponderance of the evidence," or "if you believe [it] to be true." Standards of proof and their precise delineation to the fact finder are indispensable components of the law. *Addington v. Texas,* 441 U.S. 418 (1979). In the absence of instructions guiding the jurors in their use of mitigation, there is more than a substantial probability that appellant's jurors erroneously believed the burden was on the defendant to prove a mitigating factor beyond a reasonable doubt. A new trial is required.

25. Unclear instructions arguably requiring a unanimous jury verdict on mitigation violated the 8th and 14th Amendments.

Preservation. This issue is preserved by counsel's tendered instruction No. 2, Burden of Proof, which would have informed the jury, "It is enough that if the evidence presented on his behalf when taken with the Government's, raises a reasonable doubt as to his sentence..."[230] Penalty Jury Instruction No. 6 told the jury: "If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall instead fix his penalty at a sentence of imprisonment."[231] This instruction failed to inform the jury that each individual juror could give effect to the mitigating evidence, even if other jurors disagreed.[232]

The jury instructions repeatedly emphasized to the jury that their decisions in this case must be unanimous. The Court's Instruction No. 12 during the guilt phase told the jury "The verdict of the jury must be unanimous...."[233] Penalty Jury Instruction No. 1 told the jury to "bear in mind" the guilt phase instruction on reasonable doubt and to apply that same

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[230] Defendant's Proposed Instructions, Instruction No. 2, TR XXXVI, 5329, at Tab 12.
[231] Court's Instructions ,TR XXXVIII, at Tab 2. Penalty Jury Instructions, Instruction 6 at 5614.
[232] As argued in Issue#21, above, assuming Instruction #6 informed the jury that each of them was free to select death or not based on their individual determination of mitigation, the jury's selection of death suffers from non-unanimity. If Instruction 6 did not so inform them, it violates *McKoy* and *Mills*, as argued here.
[233] Court's Instructions ,TR XXXVIII, 5591-5624, at Tab 2. Instruction 12 at 5603.

presumption during the penalty phase.[234] The very next page of instructions mandates consideration of mitigation "which you believe from the evidence to be true."[235] Nowhere is the jury told that mitigation need not be proved beyond a reasonable doubt. Nowhere is the jury told that mitigation is to be considered separately by each individual juror. Nowhere is the jury told that one juror's belief that mitigation is sufficient to preclude death is sufficient to counter a contrary conclusion by 11 other jurors. The only relevant Jury Penalty Instruction tells that jury expressly that "[t]he verdict of the jury ... must be unanimous...."[236]

A reasonable juror could easily have concluded based on the instructions given that all 12 jurors had to agree on mitigating evidence beyond a reasonable doubt for mitigation to have any effect on the verdict. Instructions that convey this impression violate the 8th and 14th Amendments. *McKoy v. North Carolina*, 494 U.S. 400 (1990); *Mills v. Maryland*, 486 U.S. 367, 374, 384 (1988), *citing, inter alia, Eddings v. Oklahoma*, 455 U.S. 104 (1982).

"An instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Guilt phase Instruction 12 read in

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[234] Court's Instructions ,TR XXXVIII, 5591-5624, at Tab 2. Penalty Instruction 1 at 5609 .
[235] Court's Instructions ,TR XXXVIII, 5591-5624, at Tab 2. Penalty Instruction 2 at 5610.
[236] Court's Instructions ,TR XXXVIII, 5591-5624, at Tab 2. Penalty Instruction 7 at 5615.

conjunction with Penalty Instructions 1, 2 and 7 fails to distinguish in any way between the manner for the jury to reach a decision on mitigation from the manner mandated for a decision on guilt and aggravation. This failure left the jury to conclude that the unanimity requirement applied to all parts of the verdict including mitigation.[237]

Each individual juror must be allowed to determine whether mitigating circumstances exist and consider it on their own. *Mills*, 486 U.S. at 384. In *Mills*, a death sentence was vacated because there was a "substantial probability" under the court's instructions that the jurors "**may have thought** they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstance." (emphasis added). Because this situation existed, a juror **could have been precluded** from giving mitigating evidence any effect whatsoever, in violation of *Lockett v. Ohio*, 438 U.S.586 (1978) and its progeny. The 6th Circuit has ruled similarly. *Gall v. Parker*, 231 F3d 265 (6th Cir. 2000); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110-11 (6th Cir. 1990) (en banc). Under both *Mills* and *Lockett* the *possibility* that the instructions might have misled the jury mandates reversal.

The Supreme Court reaffirmed *Mills* in *McCoy v. North Carolina*, 494 U.S. 433 (1990). *McCoy* makes it clear that the constitutional infirmity in *Mills* was

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[237] Court's Instructions ,TR XXXVIII, 5591-5624,at Tab 2. Penalty Instruction 7 at p. 5615.

based on the jurors' inability to give any mitigating effect to the defendant's mitigation evidence unless they were unanimous in finding that evidence. *Id*, 494 U.S. at 439. In reviewing the instructions in *Mills*, 486 U.S. at 376, the Supreme Court looked to what interpretation a "reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." The constitutional standard for reviewing instructions is not what a court declares the instructions to mean but what a reasonable juror could have understood them to mean. *Id.* Any doubt about the meaning of an instruction in a death penalty case has to be resolved in favor of the accused. *Id.* at 378.

In *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989), the court held that because juries are likely to act as a unit in sentencing, the danger of a tainted sentence is high when jurors are "never expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, [the defendant] would not be sentenced to death." The instructions in *Kubat*, as here, stressed unanimity and created the substantial possibility that jurors were precluded from properly considering mitigation due to a mistaken belief that mitigators had to be found unanimously. *See State v. McNeil*, 395 S.E.2d 106 (N.C. 1990).

Penalty phase instructions must be "sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the

mitigating ones ... [The jury's] sentencing discretion ... [must be] guided and channeled ..." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) mandates "careful instructions on the law and how to apply it."

A jury's belief that individual consideration of any mitigation evidence was precluded unless it was unanimously accepted prevented consideration of constitutionally relevant evidence. See *Boyde v. California*, 494 U.S. 370, 380 1990). In requiring juror unanimity, the penalty phase instructions violated appellant's constitutional right to have his jury consider his mitigation evidence without state-erected procedural impediments to that consideration. U.S. Const. Amend. 6, 8, 14 and Ky. Const. § 7, 11, 17. Reversal is required.

In December, 2011, the American Bar Association (hereinafter ABA) released "The Kentucky Death Penalty Assessment Report."[238] In Chapter 10, Capital Jury Instructions, the ABA noted that capital jurors in the Commonwealth are not given adequate guidance in their decision whether a defendant should live or die.[239]

> 15.6% of interviewed Kentucky capital jurors failed to understand that aggravating circumstances needed to be found beyond a reasonable doubt. Moreover, high percentages of these jurors

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[238] http://www.abanow.org/wordpress/wp-content/files_flutter/1323199256kydeathpenaltyreport_120711.pdf (last visited on 5/11/13).

[239] Chapter 10 of the ABA report is included at Tab 15.

> misunderstood the guidelines for considering mitigating evidence. In particular, 45.9% of these jurors 'failed to understand . . . that they [could] consider any mitigating evidence' while 61.8% of these jurors 'incorrectly thought [that] they had to be convinced beyond a reasonable doubt on findings of mitigation.' Finally, 83.5% of these jurors 'failed to realize [that] they did not have to be unanimous on findings of mitigation,' despite the U.S Supreme Court's decision in *Mills v. Maryland* [486 U.S. 367 (1988)] that held that such unanimity is not required.

Citing William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, note 2, at 68, 71 (2003).

A major recommendation for Kentucky is to revise jury instructions given in capital cases. ABA Report, 308. The ABA recommends that jury instructions should tell the jury (1) what mitigation means, and that the finding of mitigating circumstances does not have to be unanimous and is not subject to the beyond the reasonable doubt standard, ABA Report 311, 314-315; (2) that a non-death verdict is possible even if aggravators are found and no mitigators, *Id.* at 315-316; and (3) parole and consequences of verdict, *Id.* at 311-314. This court should reconsider the instruction and mitigation issues in light of the ABA report.

26. Failure to require written mitigation findings violated KRS 532.025 and the 8th and 14th Amendments.

Preservation. This issue is unpreserved. The sentencing authority's discretion, as exercised by both jury and judge, must be "guided and channeled

by requiring examination of specific findings that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). Written jury findings regarding mitigation are essential to "meaningful appellate review." *Proffitt*, 428 U.S. at 251 (approving Florida's statute requiring written findings). Procedures in the trial court must "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Kentucky's statute arguably requires such findings. "[T]he judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist." KRS 532.025 (1) (b).

Only with written findings can an appellate court determine whether the trial court "viewed the issue of life or death within the framework of the rules provided by statute." *Lucas v. State,* 568 So.2d 18, 24 (1990). Unfortunately, under *Smith v. Commonwealth*, 599 S.W.2d 900, 912 (Ky. 1980), Appellant's jury was not required to note which mitigators were found to exist and which were rejected. *Smith* violates *Proffitt*, and should be overruled. This court should also overrule *Bowling v. Commonwealth,* 942 S.W.2d 293, 306 (Ky. 1997), *overruled on other grounds in McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (holding that the trial court was not required to make specific findings of mitigating factors). This court should reconsider its holding in *Bowling v. Commonwealth,* 942

S.W.2d 293, 306 (Ky. 1997), *overruled on other grounds in McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (holding that the trial court was not required to make specific findings of mitigating factors).

27. Failure to instruct on consequences of the verdict and the slim to zero chance of parole violated the 6th, 8th, and 14th Amendments.

Preservation. This issue is unpreserved. The jury should have been instructed that if they sentenced appellant to death, he would be executed by lethal injection or electrocution. The jury should also have been instructed that if it sentenced appellant to life in prison, he would almost certainly spend the rest of his life in prison; and if it sentenced him to a term of years, he would almost certainly serve the entire term of years. This court has made clear that "[i]t is the responsibility of each juror to decide whether the defendant will be executed . . . ." *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985). The jury may have sentenced appellant to death thinking it was the only way to ensure public safety. The lack of this instruction denied appellant his right to reliable sentencing, due process, and a fair penalty hearing.

This court should reconsider its holding in *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997) that an instruction to the jury "that a sentence of death would result in [Defendant's] death . . . is not required by law and its omission cannot be considered error." *Id.* at 306. Additionally, an instruction should have been given to accurately inform jurors about parole. Such information is

routinely provided jurors in even the most minor felony cases. KRS 532.055(2)(a). In *Bullitt II*, this court held that even though KRS 532.025 does not specifically authorize victim impact testimony in capital sentencing proceedings, such testimony is admissible because KRS 532.025(2) provides evidence of aggravators "otherwise authorized by law," and KRS 532.055, the truth in sentencing statute, allows victim impact testimony. *Bullitt II*, 319 S.W.3d at 316-317.

But KRS 532.025(2) also allows evidence of mitigators "otherwise authorized by law." In fairness, under *Bullitt II,* KRS 532.055(2) must also be read as authorizing testimony about parole and consequences of verdicts, because knowing the truth about these factors could persuade a juror to mitigate a sentence. To deny capital defendants the same benefit of KRS 532.055 given the prosecution would deny equal protection. In light of *Bullitt II*, the court should overrule *Fields v. Commonwealth,* 274 S.W.3d 375, 417 (Ky. 2008), already overruled on other grounds in *Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010). "Truth in sentencing" parole information must be allowed to prevent a life from being forfeited due to the jury's misconception about parole. *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001). It makes no sense to have "truth-in-sentencing" in all cases except for those where the defendant's life is at stake. Failure to give parole information violated appellant's 6th, 8th, and 14th Amendment rights. *Cf. Simmons v. South Carolina*,

512 U.S.154, 160-161 (1994) (holding that the defendant was denied due process by the trial court's refusal to instruct that life imprisonment meant no possibility of parole). This court should overrule its holding to the contrary in *Mills v. Commonwealth,* 996 S.W.2d 473, 493 (Ky. 1999).

28. Under current evolving standards of decency Kentucky's death penalty violates the 8th Amendment.

Preservation. This issue is preserved.[240] In *Hardin I* appellant raised arguments against the constitutionality of Kentucky's death penalty which will not be repeated. Appellant did not argue in *Hardin I* the argument presented here: that the standards of decency in the United States have evolved so significantly in recent years, that the death penalty now violates the 8th Amendment ban against cruel and unusual punishment.

The death penalty is supposed to serve "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). But as of May 2013 in the United States eighteen people serving time on death row have been proven innocent and exonerated by DNA testing.[241] The National Research Council reported in

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[240] TR XXII, 3179, 3186-3190, 3196

[241] http://www.innocenceproject.org/Content/The_Innocent_and_the_Death_Penalty.php; site last visited on 5/22/2013.

2012 that scholarly research to date "is not useful in determining whether capital punishment increases, decreases, or has no effect on homicide rates."[242]

A 2010 national poll of 1,500 registered voters showed a clear majority of voters (61%) would choose a punishment other than the death penalty for murder, including life with no possibility of parole and with restitution to the victim's family (39%), life with no possibility of parole (13%), or life with the possibility of parole (9%).[243] In 2012 only nine states executed inmates, the fewest in two decades.[244] In 2013 Maryland has already become the sixth state in six years to abolish the death penalty.[245] On May 22, 2013, Colorado's governor --indefinitely staying the execution of Nathan Dunlap-- said, "It is a legitimate question whether we as a state should be taking lives."[246] By May 23, 2013, only 12 executions had occurred nationwide for this year, compared to 18 at the same time in 2012.[247] In 2012 the number of new death sentences was about one-third the number in 2000, with just four states accounting for almost

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[242] http://www8.nationalacademies.org/onpinews/newsitem.aspx?recordid=13363; site last visited on 5/22/2013.
[243] http://www.deathpenaltyinfo.org/public-opinion-about-death-penalty
[244] http://www.deathpenaltyinfo.org/execution-list-2012
[245] States that have abolished the death penalty: Alaska (1957), Connecticut (2012), Dist. of Columbia (1981), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1964), West Virginia (1965), Wisconsin (1853)
[246] http://www.deathpenaltyinfo.org/executions-united-states
[247] http://www.deathpenaltyinfo.org/execution-list-2012

two-thirds of those sentences.[248] Only 32 states retain the death penalty on their books, and 12 of those have not executed anyone for at least five years.[249] Those 12 states plus the 18 states without the penalty add up to 30 states that are not currently carrying out the death penalty.

These numbers are similar in magnitude to statistics the United States Supreme Court has relied on in the past to identify significant change in evolving standards of decency. The court in *Atkins v. Virginia*, 536 U.S. 304 (2002) (abolishing the death penalty for the mentally retarded) looked to the fact 30 States prohibited the death penalty for the mentally retarded, including 12 states that had abandoned the death penalty altogether [as noted in *Roper v. Simmons*, 543 U.S. 551, 564 (2005)]. Similarly, the *Roper* court relied on "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and **the consistency in the trend toward abolition of the practice**" in concluding that "today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal," *Roper v. Simmons*, 543 U.S. 551, 552 (2005) (emphasis added).

The fact that a majority of states have not carried out an execution in five years, and the apparent *consistency* of the trend against imposing or carrying out

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[248] *Id.*

[249] http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions

the death penalty, indicate an emerging national consensus against the death penalty demonstrating "the evolving standards of decency that mark the progress of a maturing society." *Simmons*, 543 U.S. at 561. This court need not stand by and wait for the United States Supreme Court to determine that American standards of decency no longer tolerate executing American citizens. It is every state court's job to examine and determine whether the punishments it imposes meet evolving national standards.

The Missouri Supreme Court didn't wait to be told by the U.S. Supreme Court. The Missouri Supreme Court **led the way** in *Simmons* by determining at the state level that the national standards had changed, that "the evolving national consensus bars the imposition of the death penalty on juveniles today, even though it did not bar it fourteen years ago...." *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 407 (Mo. 2003) *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005). This court has the authority and would be well justified in ruling that under evolving standards of decency capital punishment is cruel and unusual today under the 8th Amendment and cannot be imposed on appellant or on anyone.[250] The case should be remanded for a new sentencing in which the death penalty is not allowed.

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[250] http://www.nytimes.com/2013/01/02/opinion/americas-retreat-from-the-death-penalty.html

29. Appellant's death sentence is arbitrary and disproportionate.

Preservation. This unpreserved issue was raised in *Hardin I*, but is raised anew in this appeal due to the fact that since 2005 this court has decided numerous cases with similar or worse facts, which need to be compared. See KRS 532.075. **This court has not upheld any sentence worse than LWOP for crimes similar and *worse* than the crimes here since 2005.** Appellant's death sentence is unconstitutional based on a comparison of his case with other similar and worse Kentucky cases. Dennis Reese received life without parole. Frank Brady was kidnapped, driven to Old Boston Road under the impression that he would walk home from there, and then shot in the head and left for dead. There is no evidence that appellant or Reese intended him to suffer before he died. For that crime Kentucky has given appellant two death penalties.

By comparison, Shannon Burgher received 60 years for kidnapping and murdering his wife after holding a gun to her head for many hours. *Burgher v. Commonwealth*, 2009 WL 2707177 (Ky. 2009) (Unreported)[251] In *Stinnett v. Commonwealth*, 364 S.W.3d 70, 75 (Ky. 2011) the defendant received LWOP despite holding and torturing his murder victim for hours and –among other insults–forcing her to eat soiled cat litter. In *Fields v. Commonwealth*, 2011 WL

[251] All unreported opinions cited in this brief are attached in alphabetical order at Tab 16.

3793149 (Ky. 2011) (Unreported)[252] the defendant and a co-defendant not only kidnapped and murdered their victim, but also raped her, yet both got life sentences. Quincy Cross was convicted of capital kidnapping, capital murder, first-degree sodomy, first-degree rape, and abuse of a corpse, and received LWOP. *Cross v. Commonwealth*, 2009 WL 4251649 (Ky. 2009) (Unreported).[253] Nathaniel Wood was convicted of capital murder and capital kidnapping. After he shot his victim, while she was still alive, he dragged her body in a car with her legs hanging out dragging on the ground. He received LWOP for the capital kidnap and murder. *Wood v. Commonwealth*, 178 S.W.3d 500, 504-05 (Ky. 2005).

Under *Bush v. Gore*, 531 U.S. 98 (2000), a ballot-counting system violated equal protection because the standard for what constituted a valid vote varied from county to county. Similarly, Kentucky's standards for deciding who it will kill vary from county to county. Its death penalty scheme lacks standards, resulting in "arbitrary and disparate treatment." Just as a state may not value one person's vote over that of another, *Bush v. Gore*, 531 U.S. at 104-105, a state must ensure that it does not kill its citizens "by . . . arbitrary and disparate treatment." *Id.* Considering that this death sentence is based on the Reese's word against appellant's, considering appellant's childish mentality and

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[252] *Id.*
[253] *Id.*

considering the many worse cases where death was not imposed, appellant's death sentence must be reversed under the 8th and 14th Amendments and Ky. Const. §§ 1, 2, 3, 7, 11, 17, 26. *Meece v. Commonwealth*, 348 S.W.3d 627, 726 (Ky. 2011), *cert. denied,* 133 S. Ct. 105 (U.S. 2012) and similar cases should be overruled.

30. Kentucky's proportionality review –strongly criticized by the ABA- - violates due process.

Preservation. This issue is unpreserved. Appellant argued in *Hardin I* that Kentucky's proportionality review violates due process. Since *Hardin I* new authority has arisen consisting of the American Bar Association's published report, which contains significant findings impacting the issue.

Argument. Kentucky's proportionality review has been severely criticized by a recent American Bar Association (ABA) report. Chapter 7 of the report urges this court to establish a statewide data collection system on all death-eligible cases and broaden its method of evaluating proportionality to include cases in which the death penalty was not imposed.[254] In order for Kentucky's proportionality review to be constitutional, this court must expand its universe of cases to include all potential capital cases, regardless of result.

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[254] *Defending Liberty, Pursuing Justice, Evaluating Fairness and Accuracy in State Death Penalty Systems: the Kentucky Death Penalty Assessment Report, an Analysis of Kentucky's Death Penalty Laws, Procedures, and Practices,* available online at the AMA website: http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf (last visited on 5/30/13).

From the expanded universe, this court must cull out "similar cases, considering both the crime and the defendant" and then perform an actual comparative review as required by KRS 532.075 (3) (c).

KRS 532.075(l) mandates that whenever the death penalty is imposed for a capital offense, the sentence "shall be reviewed on the record by the [Kentucky] Supreme Court." "With regard to the sentence, the court shall determine. . . .[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3) (c). This language calls for a "comparative" review in which the court reviews the defendant and the sentence in relation to defendants and sentences in similar cases. *Pulley v. Harris*, 465 U.S. 37, 43, (1984). By contrast, in a "traditional" review the court decides whether the punishment is justified by the crimes committed. *Id.* at 42-43. The language of KRS 532.075 (3) (c) requires a comparative review, but Kentucky does not compare cases in which the death penalty was imposed to the penalty imposed in similar cases. This court has never included a non-death case for comparison.[255]

The plain wording of KRS 532.075(2) and (3) mandates that this court shall "determine whether the sentence of death was imposed under the

[255] *Cf, Sanders v. Commonwealth*, 801 S.W.2d 665, 683-684 (Ky. 1990) (listing Kentucky capital cases since 1972 in which the death penalty was imposed).

influence of passion, prejudice, or any other arbitrary factor," and "whether the evidence supports the jury's or judge's finding of statutory aggravating circumstances as enumerated in KRS 532.025(2)." Under KRS 532.075(3) (c) a death sentence must also be compared "to the penalty" imposed in similar cases. This plain language requires a comparison of the nature of the defendant and the crime with cases where different penalties were imposed besides death.

This court's deliberate failure to fairly implement its own statute violates appellant's interest in liberty and due process. *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001) (holding that a state-adopted proportionality review process must comport with due process); *accord, Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("...when a state opts to act in a field... it must act in accord with due process); *cf, Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (holding that because Hawaii's prison regulations placed no substantive limitations on official discretion they created no liberty interest protected by due process). KRS 532.075 places clear substantive limitations on official discretion and substantive due process is implicated.

Kentucky's proportionality review also denies death row prisoners procedural due process. *Cf., Harris by and through Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1286-91 (W.D. Wash. 1994) (invalidating Washington state's proportionality review for procedural due process violations, including failure to define similar case and failure to provide notice and opportunity to be

heard). Appellant has received no notice of the procedure to be followed, no adequate notice of what "similar cases" the court will consider, whether those cases will be limited to kidnap cases or whether murder cases will also be considered, or what factors will be compared, and no meaningful opportunity to be heard:

> The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner."

Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464, 469 (Ky. 2005), citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Appellant has no adequate notice of this court's standard for reviewing "similar cases." He has no notice of whether this court will adopt a "trial judge's report" as findings of fact. He has no meaningful opportunity to be heard because the court conceals the proportionality review process until its ultimate decision. Considering the heightened degree of scrutiny of procedural due process required by *Furman v. Georgia*, 408 U.S. 238 (1972), the lack of notice and lack of opportunity to be heard violate procedural due process. *Pulley v. Harris, supra.*

Kentucky's statute violates procedural due process in at least five ways. First, as in *Ramseyer*, Kentucky's statute violates procedural due process by failing to define a "similar case." Neither the legislature nor this court has determined what should be considered in determining "similar cases, considering both the crime and the defendant." In only three cases since 1970

has this court compared cases that were "similar" to the case being reviewed. For instance, this court compared the death penalty in *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997) with the death sentences in three cases of "substantial similarity" where the court had also affirmed death sentences. *Id.* at 942-943. The court compared the penalty in *Tamme v. Commonwealth*, 973 S.W.2d 13, 41 (Ky. 1998) with "those in which a defendant was sentenced to death for multiple intentional murders unaccompanied by other criminal behavior directed toward the victims, *e.g.*, burglary, robbery, rape, etc., ..." And in *Mills v. Commonwealth,* 996 S.W.2d 473, 495 (Ky. 1999), this court compared Mills' death sentence with "those in which a defendant was sentenced to death for intentional murders unaccompanied by other criminal behavior directed toward the victim, e.g., burglary, robbery, rape, etc., ... " This court made no attempt to compare the death sentences in *Foley, Tamme,* or *Mills* with the sentences in any similar case where the death penalty was **not** imposed or **not** upheld on appeal. Because the only factor the court compares is whether death was imposed, every death sentence in Kentucky has been automatically deemed proportionate. Justice Liebson's point in 1988 could still be made today, 25 years later, "Many death penalty cases have been reduced to life imprisonment on independent proportionality review by state Supreme Courts in Florida, Georgia and Texas, but none by ours." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 417 (Ky., 1988) (Liebson, J., dissenting).

Second, there is no procedure for the parties to be notified which cases this court will consider similar until after the court's determination appears in its decision. **Third**, when there are no factually similar cases, the statute provides no alternative procedure. See, *Slaughter*, 744 S.W.2d at 416. As Justice Liebson noted, "I have reviewed the fact situation in *all* of the death penalty cases listed in the Majority Opinion. There is no case similar to this one where the death penalty was affirmed." *Id.*, (emphasis in original)

Fourth, KRS 532.075 gives no standard for reviewing the selected similar cases. The court has announced no standard and makes no analyzed comparison with its list of cases since 1970. And **fifth**, no procedure is established for fact-finding as part of the proportionality review either at the trial level or on appeal. Proportionality review is conducted in a factual vacuum entirely by the Supreme Court. *McClellan v. Commonwealth*, 715 S.W.2d 464, 472-3 (Ky. 1986) (holding that the trial court shall not conduct proportionality review). This is contrary to KRS 532.075(1), which requires a "report of the trial judge" that is clearly intended by the legislature to include findings of fact related to proportionality. The fact that trial counsel did not object to the trial judge report in this case merely underscores how futile and meaningless it would be to do so, given Kentucky's history. This court's *pro forma* proportionality review ignores the "trial court report" requirement, and makes no fact-findings of its own.

North Carolina, Virginia, New Jersey, Nevada, Maryland, Washington, and Louisiana, other states with a similar proportionality review statute recognize they must compare each death penalty case with all cases containing the same factual predicate, regardless of the sentence. *See State v. Young*, 325 S.E.2d 181 (N.C. 1985); *State v. Loftin*, 724 A.2d 129 (N.J. 1999). Appellant's right to substantive due process demands that this court expand its universe to all similar cases, whether death was imposed or not. See *Correll v. Commonwealth*, 352 S.E.2d 352, 360-361 (Va. 1987), *Harvey v State*, 682 P.2d 1384, 1385 (Nev. 1984), *White v. State*, 481 A.2d 201, 212-215 (Md. 1984); *State v. Jeffries,* 132 717 P.2d 722, 740 (Wash. 1986); *State v. Neal,* 796 So.2d. 649 (La. 2001).

When conducting proportionality review in *Young, supra*, the North Carolina Supreme Court recognized that in 26 cases involving murder during the course of a robbery, jurors had returned death verdicts only three times and held the sentence of death for Young was disproportionate. If this court were reviewing the same case, it would compare Young's sentence only to cases where the death penalty was returned and automatically find the sentence proportionate. Kentucky's proportionality review ensures a death sentence will always be found proportionate; this violates due process. *Evitts v. Lucey, supra.*

"In order to ensure that a death sentence has not been arbitrarily or capriciously imposed, the states must provide 'meaningful appellate review.'" *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990); *Parker v. Dugger*, 498 U.S. 308,

321 (1991). ("[M]eaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (citation omitted). Kentucky's proportionality review fails to perform this function, although the statute requires this court to evaluate "similar cases, considering both the crime and defendant." KRS 532.075(3) (c). None of the published opinions of this court discuss the defendant's background, character, or mental age as having a bearing on the proportionality of the sentence. The failure to consider the "nature of the defendant" as well as the circumstances of the crime violates KRS 532.075 and the 8th Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

No Access To KRS 532.075(6) Data

Access to KRS 532.075 data is imperative because decisions about the appropriateness of appellant's death sentence will be made without disclosure of vital information and without the participation of counsel or argument. This offends the U.S. Const. amend. 6, 8, and 14. See *Gardner v. Florida*, 430 U.S. 349, 360 (1977); *Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1286-91 (W.D.Wash. 1994). KRS 532.075(4), states a defendant sentenced to death "shall have the right to submit briefs...and to present oral argument to the court." That statute also requires this court to reference similar cases and gives this court the authority to set aside and remand the case for resentencing "based on the

record and argument of counsel" with regard to disproportionality. KRS 532.075(5) (b). It is impossible to do that in a vacuum.

Appellant is indigent. He is unable to collect complete records of all previous actual or potential death penalty cases on his own. Therefore, he also has been denied equal protection of the law. *Griffin v. Illinois*, 351 U.S. 12 (1956). This court has previously rejected the argument presented here. *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978); *Gall v. Commonwealth*, 607 S.W.2d 97, 113 (Ky. 1980). "[T]he public defender is not entitled to such data." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 682 (Ky. 1985). Appellant asks the court to reconsider those decisions. Until this court releases the KRS 532.075 (6) data, appellant cannot fully present an argument that Kentucky's death penalty scheme is unconstitutional as applied under *Furman v. Georgia*, 408 U.S. 238 (1972). Appellant requests access to the KRS 532.075 (6) data, leave to file further argument and reversal of his sentence of death.

31. A death sentence influenced by "passion and prejudice" violates the 8th and 14th Amendments.

Preservation. This issue is unpreserved. KRS 532.075 (3) (a) requires this court to determine whether this death sentence was "imposed under the influence of . . . passion, prejudice or any other arbitrary factors." The Report of the Trial Judge (RTJ) erroneously reports that the jury was instructed "to avoid any influence of passion, prejudice, or any other arbitrary factor when

imposing sentence."[256] This is false. The jury was never instructed to avoid passion or prejudice.[257] The RTJ also errs in stating there was no evidence that could have influenced the jury to be led by passion, prejudice, or any arbitrary factor.[258] This is incorrect. The prosecution evidence included –among other passionate and prejudicial details--the testimony of Tim Keeling's widow and Frank Brady's daughter during the guilt phase, Dennis Reese's testimony describing appellant's execution style killings of Keeling and Brady, and Reese's testimony that appellant said killing a person was like killing a dog, that appellant tore up Keeling's daughter's photo, that he said "[t]here's bitch that will grow up without a daddy," and acted happy and excited after killing Keeling and Brady, that after killing Brady he felt like going to eat.

In *California v. Brown*, 479 U.S. 538 (1987), the U.S. Supreme Court said an instruction against passion and prejudice "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors...." *Id.* at 543. This court should overrule its holding in *Perdue v. Commonwealth*, 916 S.W.2d 148, 169 (Ky. 1996), that no such instruction is required.

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[256] Report of Trial Judge, February 27, 2012, Court file, p. 7 of 9, at Tab 19.
[257] Court's Instructions ,TR XXXVIII, 5591-5623, at Tab 2.
[258] Report of Trial Judge, February 27, 2012, Court file, at Tab 19.

32. Appellant is ineligible for death because he has the mental age of a child.

Preservation. This issue is preserved. Appellant moved *pro se* to exclude the death penalty on the ground that he has a mental age of a child and is functionally a juvenile.[259] The court overruled the motion.[260]

Argument. No one who has casually reviewed this record can deny appellant is childish. Like any child, he can argue, and --after making it his life's study-- he can write pidgin legalese. But nothing appellant has ever written or argued rises above grade-C middle-school level. Judge Castlen called appellant's *pro se* motions "unintelligible."[261] According to Castlen, appellant is "totally lost when it comes to filing and articulating legal reasoning and bringing up issues ruled on once or twice before. The court frequently quite frankly cannot understand what's being said in the motion...."[262]

This court is on notice and cannot deny its knowledge and awareness of additional evidence supporting appellant's juvenile mental age claim contained in the record of this same case in this court. As referenced in the Brief for Appellant in *Hardin I:*

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[259] Pro se motion, TR XXVIII, 4184-4186
[260] Hearing on June 2, 2008, VHR 6, 6/02/08, 3:00:10 ; Order denying dismissal due to appellant's "mind level," 8/01/08, TR XXVI, 3791A, at Tab 17.
[261] VHR 8, 10/18/10, 2:40:34
[262] VHR 8, 11/22/10, 1:13:03

Dr. Engum evaluated St. Clair pursuant to the court's order and found significant cognitive limitations. Engum Report (Sealed EX) at 2 - 17; A 21-38. Engum found a significant receptive language deficit resulting in perplexity and impotence in understanding, a resistance to cognitive interference and mild to moderate impairment of sustained active information processing. St. Clair's underlying thought processes appeared tangential and disorganized with the interjection of irrelevancies and some flight of ideation. There appeared to be underlying circumstantiality and illogicality in St. Clair's overall thought processes and his basic cognitive organization was at least moderately impaired. He also evidenced deficits in expressive language skills. He had very poor memory and information processing. Engum found St. Clair to be mildly mentally retarded to borderline retarded and noted his placement in special education classes as well as his failure to graduate or obtain a GED. St. Clair advised Engum his dreams help him prognosticate the future. Engum found mild impairment in visual, spatial and perceptual functioning and in St. Clair's ability to remember and manipulate orally presented information in short term memory storage. St. Clair was moderately to severely impaired in problem solving, auditory memory and verbal learning ability. Id. He evidenced significant deficits in auditory attention and initial processing. With respect to the integration of sensory information and higher level perceptual skills, St. Clair was moderately to severely impaired. St. Clair could read, write, at a 3rd grade level and functioned overall at less than a 5th grade level. Testing indicated left hemispheric brain dysfunction, and a seriously disturbed personality structure which is evidenced by disorganization of thinking, confusion, perceptual distortions, hallucinations and feelings of unreality. St. Clair's personal resources for coping with problems appear extremely limited. Testing suggested a serious thinking disorder with paranoid mentation. Engum found deficit coping skills, reality distortion and inappropriateness in interpersonal relationships. Engum's testing demonstrated impairments at the most basic level of communication and interpersonal interaction with the result that St. Clair often fails to comprehend what is communicated to him. Curiously, Engum found that despite all these cognitive limitations, St. Clair was competent to stand trial. *Id.*[263]

[263] Brief for Appellant, Issue 11 from *Hardin I,* attached at Tab 13.

When Frank Brady was murdered in Kentucky, St. Clair was 34 years old, but according to the report of psychologist Dr. Eric Engum --on file in this court in the prior appeal of this same case-- he functions at a third to fifth grade level, like a child.[264] Because the 8th Amendment bars the execution of those who commit crimes as juveniles, executing appellant is constitutionally prohibited. *Roper v. Simmons,* 543 U.S. 551 (2005) (execution of offender under eighteen at time of crime is prohibited by the 8th and 14th Amendments); see also *Graham v. Florida*, 560 U.S.48, 130 S. Ct. 2011 (2010) (8th Amendment prohibits sentence of life without the possibility of parole for juvenile offender who did not commit a homicide); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Gregg v. Georgia*, 428 U.S. 153 (1976); s*ee also Enmund v. Florida*, 458 U.S. 782 (1982) (punishment must be tailored to the personal responsibility and moral guilt of the individual offender). Justice O'Connor's dissent in *Simmons* that "chronological age is not an unfailing measure of psychological development" equally supports a prohibition on the execution of adults who are mentally juveniles. *Id.* This court should hold that executing appellant is cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution.

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[264]Neuropsychological and Psychological Evaluation by Dr. Eric S. Engum, at Tab 18. Appellant requests the court to take judicial notice of its own file in this same case in *Hardin I.*

33. Failure to consider mitigation violated the 8th and 14th Amendments.

Preservation. This issue is unpreserved. At final sentencing the court called this case "the worst one I've ever seen," and made no mention of any mitigating factor.[265] The Report of Trial Judge (RTJ) indicates the only mitigating evidence presented was that appellant acted under Reese's domination and was an accomplice.[266] The court says nothing about appellant's upbringing, his hard life, his childish mentality, or the fact his estranged wife and friends stood by him and sheltered him. The court's consideration of mitigation is so abbreviated that it must be considered a refusal to consider mitigation. See *Hitchcock v. Dagger*, 481 U.S. 393, 398-399 (1987) (after hearing numerous mitigating factors, judge listed only one, the defendant's youth; holding that sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence). This was a violation of *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (failure to give independent mitigating weight to aspects of the defendant's character and circumstances of the offense violated the 8th and 14th Amendments); *see also*, *Skipper v. South Carolina,* 476 U.S. 1 (1986).

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[265] VHR 11, 2/01/12, 1:10:06 – 1:13:07

[266] Report of Trial Judge, Court file, p. 4, at Tab 19.

34. Cumulative Error.

Preservation. This unpreserved issue is repeated in this appeal because the evidence and errors here were different from the first trial. Even if the individual errors do not rise to the level of prejudice necessitating relief, the combined effect of constitutional errors here does so. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Williams v. Anderson,* 460 F.3d 789, 816 (6th Cir. 2006). The cumulative effect of the evidentiary and instructional errors denied appellant's right to a fair and rational jury determination, leading to his death sentence. U.S. Const. Amend. 5, 6, 8 and 14 and Ky. Const. § 1, 2, 3, 7, 11, 17, 26. These convictions and sentences must be set aside and vacated. *Funk v. Commonwealth,* 842 S.W.2d 476, 483 (Ky. 1993); *Sanborn v. Commonwealth,* 754 S.W.2d 534, 542 – 549 (Ky. 1988).

35. Residual doubt bars death sentence.

Preservation. This unpreserved issue is repeated here because the evidence in the third trial differed from that in the first trial. Residual doubt about a capital defendant's moral culpability can legitimately support a sentence less than death. *Lockhart v. McCree,* 476 US 162, 181-182 (1986). This court implicitly acknowledged that the existence of doubt about guilt is a proper factor to consider in determining whether death is appropriate by including item C(10) in the trial judge's report form. Item C(10) asks whether the evidence forecloses "all doubt respecting the defendant's guilt?" In response to

this question, the trial judge responded the evidence foreclosed all doubt.[267] But that is patently untrue. There is no way all doubt could possibly have been foreclosed based entirely on the questionable testimony of Dennis Reese, a convicted murderer and highly self-interested co-defendant. Because not all doubt was eliminated about appellant's guilt, his death sentence violates the 8th and 14th Amendments of the United States Constitution and §§ 2, 3, 11, 17, and 26 of the Kentucky Constitution.

Conclusion

Appellant Michael Dale St. Clair's conviction should be vacated and his death sentence reversed. Both a new guilt phase and a new sentencing phase are required.

Respectfully submitted,

Susan J. Balliet Samuel N. Potter Robert C. Yang

June 3, 2013

[267] Report of Trial Judge, p. 4, Court file, attached at Tab 4.